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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of STEVEN STUPP  
and ANNEMARIE SCHILDERS.

STEVEN STUPP,  
Respondent,

v.

ANNEMARIE SCHILDERS,  
Appellant.

A154396

(San Mateo County  
Super. Ct. No. FAM0110799)

Annemarie Schilders appeals from a family court order that she pay Steven Stupp \$2,500 in discovery sanctions. Because the amount of the sanctions award was not supported by admissible evidence, we vacate the sanctions order.

**FACTUAL AND PROCEDURAL BACKGROUND**

In 2010, Stupp filed a petition to dissolve his marriage to Schilders. A stipulated judgment of dissolution was entered in March 2014, and litigation has continued since then.

On October 26, 2017, Schilders filed a request for order in which she asked the family court to direct Stupp to provide “further and complete responses” to more than 30 individual requests for production of documents that had been served on him in August 2017. Schilders supported her request for order with a declaration from her attorney, Ester Adut, who attached two email chains that showed her efforts to meet and confer with opposing counsel. A hearing was scheduled for January 2018.

Stupp filed his response to the request for order in December 2017. The response consisted of three documents: Judicial Council form FL-320, entitled “Responsive Declaration to Request for Order,” which is to be signed under penalty of perjury that the information provided in the form and attachments is true and correct; a memorandum of points and authorities which, among other things, asked that Schilders be ordered to pay him \$2,500 as discovery sanctions; and an additional declaration, purportedly from his attorney Alissa Kempton, who estimated that Stupp incurred \$1,500 in fees and costs in responding to Schilders’s motion and would incur an additional \$1,000 in fees and costs to prepare for and attend the hearing. But Ms. Kempton did not sign any of the three documents: Although her name was typed on each of them, the signatures were from some other person, who wrote that he or she was signing “for” Ms. Kempton.

Schilders then filed a motion to strike Stupp’s responsive documents. She argued that the Judicial Council form and accompanying declaration were defective and not admissible because they were not signed by the declarant, and that the memorandum of points and authorities was defective because it was not signed by Stupp or one of his two attorneys.

At the January 2018 hearing, the family court granted Schilders’s motion to strike Stupp’s responsive pleading, explaining, “The Court of Appeal has reviewed the practice of declarations being signed by other than those who are purporting to swear under penalty of perjury, and that is not a practice that the Court can tolerate or accept, and that such a declaration is not compliant with the Code of Civil Procedure regarding the requirements for the filing of the motion.”

The family court then addressed Schilders’s motion to compel, and began with an extended question for Schilders’s counsel: “Ms. Adut, the question I have for you about your motion to compel is that the motion to compel is required to contain a declaration establishing reasonable and good faith efforts to meet and confer regarding attempting an informal resolution of each issue presented by the motion. And that’s required by Codes of Civil Procedure Section 2016.040. [¶] In your pleadings, I noted that you had attached a series of e-mails which you represent were the efforts to meet and confer. They

consisted of a series of e-mails sent beginning on October 24th, when you inquired of Ms. Kempton when she would be available to meet and confer. Ms. Kempton responded the next day, indicating she was available to meet and confer in writing and requesting that you provide her with a written description of the issues that you wanted to discuss, to which you responded on October 26th at 11:33 with a detailed description of your belief as to the deficiencies of any discovery response that had been provided. [¶] There was a subsequent e-mail by you about 19 minutes later asking for a response, and then the motion appears to have been filed on October 26th, the same day that the substantive deficiencies in the response were first brought to Ms. Kempton's attention. [¶] So I guess the question that I have is: To what extent or how do you intend to argue to the Court that identifying deficiencies in the responses on the same business day that you filed the request for motion to compel demonstrates a reasonable and good faith attempt at an informal resolution of the issues presented?"

Ms. Adut responded that Ms. Kempton "never responded to me as far as actually meeting and conferring. . . . [¶] She basically said it has to be in writing. . . . [¶] I put it in writing, and she never responded one way or another."

In a colloquy with Ms. Adut, the family court determined that Ms. Adut had received the discovery responses that precipitated the motion to compel on about September 17. The family court then asked Ms. Adut, "[I]f you had the responses for approximately 30 to 40 days prior to the first time that you e-mailed Ms. Kempton to ask her whether she was available to meet and confer and the first time you actually pointed out . . . the deficiencies in the response [was] on the same day that you filed the motion, again, how does that reflect a good faith reasonable attempt at informal resolution prior to the filing of the motion?"

Ms. Adut responded that she asked Ms. Kempton to meet with her, and instead of agreeing to meet, Ms. Kempton "insisted it be in writing." When she sent Ms. Kempton the information in writing and received nothing in response "[t]he entire rest of the day," Ms. Adut thought she had made a good faith effort.

The family court then heard argument from both sides on the substance of the motion to compel and announced its order from the bench. The court concluded that Schilders had not made a reasonable good faith attempt to informally settle the motion to compel, and denied the motion for that reason.

The court further stated, “Code of Civil Procedure Section 2031.320 requires that where a party unsuccessfully makes or opposes a motion to compel, the Court shall impose sanctions unless ‘the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.’ [¶] When the party seeking the motion acts in the manner that has been described here, allowing less than 48 hours to even attempt to meet and confer and less than five hours to actually provide a substantive response prior to filing a motion to compel, there is no substantial justification that makes that behavior acceptable. And there is no circumstance here which would make the imposition of a sanction unjust, in the Court’s view, given the discovery history in this matter. [¶] So the Court is going to impose sanctions in the amount of \$2,500 against Ms. Schilders and in favor of Mr. Stupp for abuse of the discovery process under 2031.320.”

In March 2018, the family court entered a written order after hearing. Schilders timely appealed, challenging the imposition of the \$2,500 discovery sanction.<sup>1</sup> Stupp did not file a respondent’s brief, and oral argument has been waived. Therefore, we decide the appeal on the record and Schilders’s opening brief. (Cal. Rules of Court, rule 8.220(a)(2).)

## **DISCUSSION**

### **A. *Applicable Law***

The Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.<sup>2</sup>) includes several provisions authorizing judges to impose monetary sanctions. Those provisions include

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<sup>1</sup> Schilders does not challenge the portions of the order that granted her motion to strike Stupp’s responsive pleading and denied her motion to compel.

<sup>2</sup> Further statutory references are to the Code of Civil Procedure.

section 2031.320, subdivision (b), which states, “the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand [for inspection, copying, testing, or sampling], unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.” In such circumstances, the unsuccessful party must pay the reasonable expenses, including attorney fees, incurred by the successful party. (§§ 2023.010, subd. (h); 2023.030, subd. (a).)

A motion to compel compliance with a document request “shall be accompanied by a meet and confer declaration under Section 2016.040.” (§ 2031.310, subd. (b)(2).) Section 2016.040 requires that “[a] meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.” It is a misuse of the discovery process to “[fail] to confer . . . in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.” (§ 2023.010, subd. (i).) Section 2023.020 provides that, regardless of the outcome of a discovery motion, “the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney’s fees, incurred by anyone as a result of that conduct.”

A request for sanctions must specify the type of sanction sought and must be “accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.” (§ 2023.040.)

## B. *Analysis*

Schilders advances several arguments in her appellate brief, but we need address only one: once Ms. Kempton’s declaration was stricken, there was no evidence in the record to support the amount of the sanctions award, and therefore the award was unauthorized under section 2023.040.

“We review the trial court’s ruling on a discovery sanction under the deferential abuse of discretion standard.” (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.) It is an abuse of discretion to impose discovery sanctions that do not comport with the statutory authority on which the sanctions are based. (See *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 191-195 [abuse of discretion for court to award monetary sanctions beyond the reasonable expenses incurred, as authorized by § 2023.030, subd. (a)].)

We agree with the family court that Ms. Adut’s declaration did not fulfill the section 2016.040 requirement to show a reasonable and good faith attempt at an informal resolution of the matters presented in her motion to compel. And it is well-established that monetary sanctions are to be imposed in the absence of a declaration that shows the parties have met and conferred as required by section 2016.040. (§§ 2023.010, subd. (i); 2023.020; 2023.040, subd. (a); see also Knighten, Cal. Judges Benchbook: Civil Proceedings, Discovery (2018) § 2.27, p. 28.) Further, as a general matter monetary sanctions are to be imposed on a party who, like Schilders, is unsuccessful in bringing a motion to compel. (§ 2031.310, subd. (h).) However, the family court erred in imposing a \$2,500 discovery sanction on Schilders in the absence of any admissible evidence of the expenses that Stupp incurred in responding to Schilders’s motion to compel. (See § 2023.040 [requiring declaration setting forth facts supporting amount of monetary sanctions sought].)

The only evidence in the record that could support the award of \$2,500 in sanctions was contained in Ms. Kempton’s declaration. That declaration was stricken. In the absence of any supplemental declaration, or testimony or offer of proof from Ms. Kempton, there is no substantial evidence in the record to support the amount of sanctions awarded, the family court’s award is an abuse of discretion. (*In re Marriage of Niklas* (1989) 211 Cal.App.3d 28, 38 [monetary sanctions order must be supported by evidence sufficient to support a finding that the amount of sanctions reflects the amount spent or incurred].) Accordingly, we shall vacate the portion of the family court order that directs Schilders to pay \$2,500 to Stupp as a discovery sanction.

### **DISPOSITION**

The portion of the family court's March 23, 2018 order that requires Schilders to pay \$2,500 in discovery sanctions to Stupp is vacated. Schilders shall recover her costs on appeal.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A154396, *Stupp v. Schilders*